

Department of Homeland Security, Immigration and Customs Enforcement Reverses Course on Remote I-9 Verification and Issues New Form I-9

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by J. Mike Sevilla

As we previously wrote, in May, the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) announced an end to employers' ability to remotely inspect I-9 documents (an accommodation made during the height of the COVID-19 pandemic) on July 31, 2023. This meant that employers would no longer have the option to complete I-9 document verification remotely for those employees working remotely because of the pandemic, and employers who previously completed I-9 document verification needed to re-verify those documents in person by the end of August 2023. Wisely, employers throughout the U.S. began to take steps to ensure compliance.

On July 21, 2023, both DHS and ICE reversed course and issued a final rule permitting remote I-9 verification for employees under certain circumstances, even if those employees are not remote workers. Employers that choose to take advantage of remote I-9 verification (referred to by ICE as the "Optional Alternative Procedure for Document Examination") will be required to follow a specific verification procedure set forth in the final rule and will be subject to additional recordkeeping requirements. The final rule, which was officially published on July 25, 2023 and takes effect August 1, 2023, also includes the issuance of a new Form I-9 that employers must use as of November 1, 2023.

What employers are eligible for the Optional Alternative Procedure for Document Examination?

At this time, ICE indicates that the Optional Alternative Procedure for Document Examination is only available to employers enrolled in, and in good standing with, E-Verify.

In addition, any new E-Verify employers and users must complete the free E-Verify tutorial available as part of the E-Verify enrollment process. The tutorial includes fraud

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awareness and anti-discrimination training.

Are eligible employers required to use the Optional Alternative Procedure for Document Examination for all new hires?

No, the final rule indicates that employers have some discretion. For example, an employer could choose to utilize the Optional Alternative Procedure for Document Examination for remote or out-of-state employees but still use traditional I-9 document verification for on-site employees. That said, employers that choose to utilize the Optional Alternative Procedure for Document Examination must do so on a non-discriminatory basis. In other words, employers cannot offer the Optional Alternative Procedure for Document Examination for some workers and not others in the same situation.

What are the steps in the Optional Alternative Procedure for Document Examination?

Within 3 business days of an employee's first day of employment (the same timeline as in-person verification), the employer (or its authorized representative) must:

First, examine copies (front and back, if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine.

Second, conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. During the live video interaction, the employee must re-present the Form I-9 documents previously provided to the employer.

Third, complete the corresponding box on the new Form I-9, indicating that the employer utilized the Optional Alternative Procedure for Document Examination. ICE reminded employers that they are liable for errors on the Form I-9, so employers should make sure they are checking the proper box if the alternative procedure is used.

Fourth, retain copies of the documentation (front and back, if the document is two-sided). Employers must then make these documents available to the government in the event of an audit or investigation.

What are the new recordkeeping requirements for the Optional Alternative Procedure for Document Examination?

As set forth above, employers utilizing the alternative procedure are required to retain clear and legible copies of all documents presented by the employee seeking to establish identity and employment eligibility for the Form I-9. As a reminder, employers using traditional in-person verification methods are not required to retain copies of documents,

but if the employer voluntarily chooses to do so, the employer must retain copies on a non-discriminatory basis.

Is the Optional Alternative Procedure for Document Examination set in stone or will there be additional changes?

The final rule indicates that the Secretary of the Department of Homeland Security will monitor the use of the new procedure and may announce changes or additions to the procedure as time goes on.

What are the changes to the Form I-9?

The new Form I-9 is now available on USCIS's website, and includes the following changes:

- condenses Sections 1 and 2 to a single page;
- will be fillable on tablets and mobile devices;
- moves the Section 1, "Preparer/Translator Certification" area to a separate, standalone supplement that employers can provide to employees where applicable;
- moves Section 3, "Reverification and Rehire," to a standalone supplement that employers can print if or when rehire occurs or reverification is required;
- revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance regarding automatic extensions of employment authorization documents;
- reduces the number of instruction pages; and
- includes the checkbox indicating use of the Optional Alternative Procedure for Document Examination.

When do employers have to start using the new Form I-9?

USCIS issued the new Form I-9 on August 1, 2023. Employers may use the current version of the Form I-9 through October 31, 2023, though if an employer is utilizing the Optional Alternative Procedure for Document Examination, it must use the new Form I-9 so that it can check the proper box. All employers—regardless of document examination method—must use the new Form I-9 beginning November 1, 2023. Failure to use a proper Form I-9 can result in employer liability.

What should employers do now?

If you are an employer and want to utilize the new Optional Alternative Procedure for Document Examination, you should do the following:

1. Make sure you are enrolled in, and in good standing with, E-Verify.
2. Complete the required training through E-Verify.
3. Ensure that you have the technology necessary to receive employment verification documents, conduct live video interactions, and retain employment verification documents.
4. Starting August 1, 2023, use the new Form I-9.